BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

AMERICAN BOTTOM CONSERVANCY Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES STEEL CORPORATION – GRANITE CITY WORKS Respondents.	)	PCB No. 2006-171 (NPDES Permit Appeal)

NOTICE OF FILING

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PLEASE TAKE NOTICE that on March 23, 2007, there was filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of **American Bottom Conservancy's Response to United States Steel's Amended Motion to Reconsider**.

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v.	)	
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	)	
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	)	

AMERICAN BOTTOM CONSERVANCY'S RESPONSE TO UNITED STATES STEEL CORPORATION'S AMENDED MOTION TO RECONSIDER

Petitioner, American Bottom Conservancy ("ABC"), respectfully asks the Illinois Pollution Control Board ("Board") to deny United States Steel Corporation's ("U.S. Steel") Amended Motion to Reconsider. In support of its Response, ABC states as follows:

I. INTRODUCTION

On January 26, 2007, the Board entered an Opinion and Order ("Board Order") holding that the Illinois Environmental Protection Agency's ("IEPA") failure to hold a public hearing prior to issuing a NPDES permit for U.S. Steel's Granite City Works violated the Board's regulations. The Board concluded that the record demonstrated significant public interest in the subject permit and that its regulations required that a public hearing be held. Therefore, the Board invalidated the permit pending a public hearing.

The Board did not misapply the law in issuing its Order as U.S. Steel argues in its Amended Motion to Reconsider. The Board has authority pursuant to the Illinois Environmental Protection Act (the "Act") to hear permit appeals and to grant appropriate remedies. To suggest, as U.S. Steel does, that the Board does not have the power to invalidate permits after finding a violation of applicable regulations is to render meaningless the Board's quasi-judicial functions. U.S. Steel also argues that the Board should have applied a deferential "abuse of discretion" standard of review when it reviewed IEPA's decision to forego a public hearing. However, neither the Act nor applicable judicial authority require the Board to accord such deference to IEPA's decisions. In fact, the Illinois Supreme Court has expressly held that the Board does not owe such deference to IEPA's decisions.

Finally, U.S. Steel argues that ABC did not prove the existence of a significant degree of public interest in the permit. But if ever there were a situation deserving of a public hearing, the permit for U.S. Steel's Granite City Works is it. The permit authorizes a major industrial discharge into a lake located within a state park that is visited by hundreds of thousands of people each year. The permit literally authorizes U.S. Steel to discharge hundreds of tons of pollutants each year into Horseshoe Lake, a lake that is already listed as "impaired." These facts, combined with requests for a public hearing from organizations representing thousands of members, leave no doubt that a hearing should have been held.

II. BACKGROUND FACTS

On December 19, 2004, IEPA put on public notice a proposed NPDES permit for U.S. Steel's Granite City Works. (AR 518-28).[1] The proposed permit attached to the public notice (AR 524-28) and the final permit that was issued some fourteen months later (AR 651-57) both allowed for hundreds of tons of pollutants to be discharged into Horseshoe Lake each year.[2]

During the thirty-day comment period that ran from December 19, 2004, through January 18, 2005, five organizations submitted written comments. One of the letters was submitted by the organization Health & Environmental Justice-St. Louis (AR 532) and the other was jointly submitted by five organizations, including ABC, the Sierra Club, Webster Groves Nature Study Society, Health & Environmental Justice-St. Louis, and the Neighborhood Law Office. (AR 537-39). The comment letters requested a public hearing, asked for an extension of the comment period, and raised numerous concerns about the proposed permit. Specifically, the letters cited "discharges of toxic heavy metals known to accumulate in biological organisms," the fact that the Lake is already listed as "impaired" by several pollutants, that academic studies had shown high levels of metals in the Lake's sediment, and that U.S. Steel has a history of non-compliance. The letters also pointed out that the Lake is used heavily for recreation, including for bird watching, hunting, and fishing and that many people consume fish from the Lake, some for subsistence purposes.

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[1] The designation "AR" refers to the administrative record for this appeal. The designation "Tr." refers to the transcript from the November 20, 2006, hearing in this appeal.

[2] There were only two changes made to the final permit, both of which were in response to comments submitted by U.S. Steel. (AR 635).

There was no apparent action by IEPA on the permit for nearly ten months after the organizations submitted their comments. ABC took this opportunity to engage the Washington University Interdisciplinary Environmental Clinic ("IEC") to conduct a further review of the proposed permit. The IEC thereafter submitted comment letters on October 3, 2005, and December 9, 2005, on behalf of ABC. (AR 607-09, 611-23). These letters reiterated the request for a public hearing and identified in a greater level of detail numerous concerns with the draft permit, including that it would allow U.S. Steel to discharge pollutants for which the Lake was already impaired, that the effluent limit for cyanide was double that recommended by IEPA's own permit writer, and that the permit would allow an unlawfully high level of ammonia in the discharge. (AR 611-23).

IEPA initially issued the permit to U.S. Steel on March 8, 2006, more than a year after the public comment period had closed. (AR 635-43). Despite this lengthy period of time, IEPA failed to respond to the comments prior to issuing the permit – an oversight that it acknowledged was inconsistent with applicable regulations after ABC inquired – and it subsequently reissued the permit on March 31, 2006. (AR 648, 651-57). IEPA did not amend the draft permit in any respect in response to the public comment letters, nor did it ever provide an explanation to the commentors as to why it decided not to hold a public hearing. (AR 649-50).

On May 8, 2006, ABC filed its Petition for Review, which sought the Board's review of various effluent limits in the permit and of IEPA's decision to forego a public hearing. By Order dated September 21, 2006, the Board dismissed ABC's claims challenging the effluent limits in the permit because the claims were not based on comments submitted during the initial thirty-day comment period. A Board hearing was

held on November 20, 2006, at which testimony was heard on the remaining issue of whether IEPA's decision not to hold a public hearing complied with the Board's regulations.

On January 26, 2007, the Board entered its Order holding that the decision of the IEPA not to hold a public hearing prior to issuing the permit to U.S. Steel was error. Board Order, p.14. The Board invalidated the permit and ordered a public hearing. *Id.* On March 9, 2007, U.S. Steel filed its Amended Motion to Reconsider.

III. ARGUMENT

A. Standard of Review for Motions to Reconsider

For U.S. Steel to prevail on its Amended Motion to Reconsider, it must "bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." *People v. Community Landfill Co., Inc.*, PCB No. 03-191, 2006 Ill. Env. LEXIS 323, 2-3 (June 1, 2006) (citations omitted). *See also* 35 Ill. Adm. Code § 101.902 ("In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error."). Further, "[r]econsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character so as to make it probably [*sic*] that a different judgment would be reached." *Community Landfill* at 3 (citation omitted).

U.S. Steel has come forward with no newly discovered evidence or changes in the law. Therefore, the only issue before the Board is whether it misapplied the law. U.S. Steel has not met its burden of showing that the Board misapplied any laws. Therefore the Board should deny U.S. Steel's motion.

B. The Board Has the Authority to Grant Meaningful Remedies, Including Invalidation of a Permit.

The Act gives the Board the power to hear third-party appeals of NPDES permits, 415 ILCS § 5/40(e)(1), and to "enter such final order, or make such final determination, as it shall deem appropriate under the circumstances." 415 ILCS § 5/33(a).[3] The Board therefore has the authority to invalidate permits that have been issued in violation of the Act or applicable regulations. U.S. Steel's suggestion that the Board does not have this power threatens to render meaningless the Board's quasi-judicial functions. The power to hear appeals is only significant if there is a concomitant power to remedy violations proven in the course of such appeals.

Well-established principles of administrative law support the Board's authority to grant meaningful remedies in permit appeal proceedings. Administrative agencies such as the Board have those powers expressly delegated by statute as well as those "found, by fair implication and intendment, to be incident-to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the objectives for which the agency was created." *Illinois Dep't of Public Aid v. Brazziel*, 377 N.E.2d 1119, 1121-22 (1st Dist. 1978) (citation omitted).

In *Brazziel*, the First District Appellate Court upheld the validity of a section of the Rules of the Civil Service Commission relating to state employees against an argument that such rules were not expressly authorized by statute. *Id.* at 1120. The Court held that the section was valid because "on its face [it] aids the Commission in accomplishing the objectives for which it was created, which is the protection of the

[3] The statutory authority of the Board to grant "appropriate" remedies, while located in the enforcement title of the Act, is incorporated by reference into the Act's permit appeal provisions. *See* 415 ILCS §§ 5/40(e)(3)(i) and 5/40(a)(1).

public and in carrying out that purpose the protection of civil service employees." *Id*. at 1122 (citation omitted).

Here, the Board has statutory authority to hear permit appeals and to grant "appropriate" remedies. The power to invalidate unlawfully issued permits is also necessary for it to carry out its purpose of ensuring that NPDES permits comply with the Act. Allowing the permit to stand while IEPA holds a public hearing, as suggested by U.S. Steel, would not provide an adequate remedy for the agency's unlawful failure to hold a public hearing in the first instance. Not only would the unlawful permit stay in existence for some undetermined length of time while pollutants continued to impact Horseshoe Lake, but the IEPA's decision whether to issue the permit could well be prejudiced by the fact that it remains in effect at the same time that public testimony is being accepted. That is, it is easier to prevent a faulty permit from being issued than it is to have the bureaucratic machinery re-open and modify an existing permit.

The Illinois Supreme Court has held that when a public hearing is required the public hearing must occur *before* a permit is issued and the IEPA must consider the evidence presented at the public hearing before issuing the permit. *Pioneer Processing, Inc. v. EPA*, 464 N.E.2d 238 (Ill. 1984). In *Pioneer*, the IEPA considered evidence submitted by Pioneer before and after the public hearing – thus the parties challenging the permit had no opportunity to examine this evidence. The IEPA argued that this was of no consequence because its "decision to grant or deny a permit precedes the public hearing." *Id*. at 248. The Illinois Supreme Court held that this was improper:

> We believe that if the Agency were to make its decision regarding the issuance of a permit prior to conducting the public hearing, *then the public hearing would serve no purpose*. Certainly, the legislature did not intend to require a public hearing simply to create the illusion that the Agency

> was considering the evidence admitted during that hearing in making its decision.

Id. (emphasis added).

Pioneer dealt with a different statute in that it involved a permit for hazardous waste, which required a public hearing in all circumstances without a showing of a significant degree of public interest.[4] Nevertheless, the reasoning of the Supreme Court applies equally to the present case where a public hearing was required due to a finding of significant public interest. The statutory requirement for a public hearing would be neutered were the permit to stand. To give the public hearing requirement meaning, the hearing must logically come before the permit is issued such that evidence submitted at the hearing can inform the IEPA's decision. Otherwise, the public hearing is no more than a charade to create the "illusion that the Agency was considering the evidence admitted during that hearing in making its decision." *Pioneer*, 464 N.E.2d at 248. The Board therefore acted appropriately, and within its statutory authority, when it invalidated the illegally issued permit.[5]

C. U.S. Steel's Equitable Arguments Do Not Warrant Reconsideration of the Board's Order

"A motion to reconsider may be brought to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the

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[4] When *Pioneer* was decided, the applicable statute was § 39(c) of the Environmental Protection Act. That section has been amended, and 415 ILCS § 5/39.3(c)(i) now provides that the IEPA must hold a public hearing after issuing a preliminary decision on whether to issue or deny a hazardous waste permit. Its final decision still must reflect the evidence presented at the public hearing.

[5] U.S. Steel spends considerable time arguing that ABC failed to prove that the permit would result in a violation of water quality standards or effluent limitations. This argument misses the mark. The very purpose of the public hearing is to solicit evidence on this issue and ABC will show during the public hearing why the permit should not have been issued as proposed. Moreover, ABC has already submitted to IEPA information showing that many of the permit's limits were incorrect. (AR 611-23). This evidence was excluded from consideration by IEPA because it was submitted after the initial 30-day public comment period.

law or errors in the [Board's] previous application of existing law." *Community Landfill*, 2006 Ill. Env. LEXIS 323 at 2-3. *See also* 35 Ill. Adm. Code § 101.902 ("In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error").

U.S. Steel alleges in its Amended Motion to Reconsider that it has "made modifications to its facility and operations as a result of the requirements contained in the Final Permit." U.S. Steel Memo in Support, p.10. It also alleges that unless the Board reconsiders its Order it "would have to deconstruct certain modifications to comply with its previous NPDES permit until IEPA issues a new permit after the public hearing." *Id*. U.S. Steel references only one modification it allegedly made in reliance on the permit – piping that was constructed to treat landfill leachate. *Id*. at 11, footnote 8.

This argument is irrelevant as equitable arguments are not a valid basis on which to urge the Board to reconsider its Order. The fact that U.S. Steel relied on an unlawful permit is not newly discovered evidence, a change in the law, or a misapplication of existing law, and is therefore not a basis for reconsideration.

Moreover, the hardship this imposes on U.S. Steel is far from clear. U.S. Steel has not identified the costs involved with the alleged modification, nor has it stated why it would have to deconstruct the pipes installed to handle the leachate. Prior to issuance of the permit, U.S. Steel apparently trucked this potentially hazardous waste to off-site disposal locations. (AR 292). There is no indication why this practice could not be employed again until this and other issues can be fully considered through a public hearing.

D. The Board is Not Required to Apply an "Abuse of Discretion" Standard of Review When Reviewing IEPA's Decision Not to Hold a Public Hearing.

U.S. Steel argues that the Board is required to give considerable deference to IEPA's decision not to hold a public hearing. It suggests that the Board is obliged to apply the deferential "abuse of discretion" standard of review. This narrowing of the Board's quasi-judicial role – and concomitant expansion of IEPA's power over permitting decisions – is not warranted by the Act, the Board's regulations, nor governing judicial authority.

The Illinois Supreme Court rejected a nearly identical argument twenty-one years ago in *IEPA v. IPCB,* 503 N.E.2d 343 (Ill. 1986). The Supreme Court held that when the Board acts in its quasi-judicial role in relation to permits issued by IEPA it is not constrained by a narrow standard of review. *Id.* at 345. Only in situations where the underlying decision was made as part of a more rigorous adversarial proceeding might the Board owe deference to the decisionmaker. *Id.*[6] Like the situation in *IEPA v. IPCB,* IEPA's decision to deny the requests for a public hearing for the U.S. Steel permit was made without an adversarial proceeding below. In fact, IEPA never even provided ABC or other commentors with an explanation of why it decided not to hold a hearing. The unexplained decision by IEPA to not hold a public hearing on the U.S. Steel permit should not be accorded a deferential standard of review.

U.S. Steel relies extensively upon the Third District's decision in *Borg-Warner v. Mauzy,* 427 N.E.2d 415 (3rd Dist. 1981), to argue that the Board must apply an abuse of discretion standard of review. That case is distinguishable in that the plaintiff company

[6] At the time *IEPA v. IPCB* was decided, only permit applicants were authorized by the Act to appeal IEPA's permitting decisions. The Supreme Court's reasoning applies equally to the subsequently authorized third-party appeals of NPDES permits.

filed suit directly in the circuit court, arguing that it was entitled under the Illinois Administrative Procedure Act to an "adjudicatory hearing" before IEPA made a decision on its permit application. *Id.* at 417. The Third District's commentary about the Board's public hearing regulation was thus made in the context of *judicial* review and the court did not hold that the *Board* must defer to IEPA's decision on whether or not a public hearing is required. *Id.* at 417. In fact, the court noted that the Board applies *de novo* review in permit appeals. *Id.* at 420. As acknowledged by the Supreme Court in *IEPA v. IPCB*, courts and the Board apply different standards of review. *IEPA v. IPCB,* 503 N.E.2d at 345-46.

It would be illogical, as U.S. Steel urges the Board to do, to treat decisions made under the public hearing regulation differently than decisions made under other sections of the Act or regulations. For example, Section 39(b) of the Act states that IEPA "may issue NPDES permits." 415 ILCS 5/39(b). The fact that the Act assigns this duty initially to IEPA, and that it uses the word "may," does not render such decisions immune from Board review, nor insulate IEPA's decision with a deferential standard of review. *See IEPA v. IPCB,* 503 N.E.2d at 345. Similarly, the Board's regulations contain an anti-degradation policy that requires site-specific application of relatively broad regulatory terms. *See* 35 Ill. Admin. Code § 302.105(c). Application of these terms to specific permits is no different from determining whether the standard of "significant degree of public interest" has been met. In sum, there is no legal or logical rationale for treating IEPA's decision on public hearing requests differently from other decisions made as part of the permitting process. *See also Prairie Rivers Network v. IPCB,* 781 N.E.2d 372,

379-80 (4th Dist. 2002) (finding that identical burden of proof applied to substantive and procedural challenges to NPDES permit).

The Board's regulation governing public hearings cannot be brushed aside by U.S. Steel as it would apparently like to do. The Board has broad authority under the Act to adopt regulations to "implement" the environmental standards of Illinois. 415 ILCS § 5/5(b). It is also within the Board's authority to ensure that these regulations are complied with through its quasi-judicial powers. *Id.* § 5/40. There is nothing in these provisions that require the Board to defer to IEPA's determination not to hold a public hearing. The Board's expertise in the environmental field and its responsibilities under the Act support use of the *de novo* standard of review applied in this appeal.

E. The Board's Findings Would Satisfy the Abuse of Discretion Standard of Review.

Even if the Board applied an abuse of discretion standard of review, ABC would still prevail. The Board found in its Order that "the decision that there was not a significant degree of public interest was *clearly incorrect*." Board Order, p.14 (emphasis added). "Clearly incorrect" is nearly synonymous with "clearly against logic," one of the interpretations given to the abuse of discretion standard by Illinois courts. *Deen v. Lustig*, 785 N.E.2d 521, 529 (4th Dist. 2003). Webster's Dictionary defines "incorrect" as "not true" and "logical" as "formally true or valid." *Merriam Webster's Collegiate Dictionary*, 589, 685 (10th ed. 1993). Thus, to say something is "clearly incorrect," as the Board said about IEPA's decision to forego a public hearing, is to find that it is clearly untrue, or "clearly against logic." The findings in the Board's Order would survive an abuse of discretion standard of review if one were applied.

F. There Was a Significant Degree of Public Interest in the U.S. Steel Permit.

Finally, U.S. Steel rehashes in its Amended Motion to Reconsider the arguments considered at the November hearing on the merits and set forth in the post-hearing briefs. Specifically, it argues that the record does not demonstrate a significant degree of public interest in the permit. This argument lacks merit, as the Board already concluded in its January 26, 2007, Order.

1. Horseshoe Lake is Used Heavily by the Public.

It is hard to imagine a permit more deserving of a public hearing than one for a major industrial discharge into an impaired lake, located within a popular state park, where people fish and eat their catch. (AR 532, 537). That is the exact situation here. Horseshoe Lake is located within a state park that is used heavily for birdwatching, fishing, hunting, and other forms of outdoor recreation. (AR 532, 537-39). IDNR's website touts the fishing opportunities at Horseshoe Lake for species such as "channel catfish, bass, crappie, bluegill, carp, and buffalo." (AR 532).

At the hearing on this appeal, representatives of organizations that submitted comment letters offered testimony that elaborated upon the issues raised in the letters. Kathy Andria is President of ABC and uses the Lake about once per week for birdwatching and other outdoor recreation. (Tr. 25:11-24). She testified that Horseshoe Lake is a "spectacular" place to birdwatch (Tr. 26:3-12) and that she has observed large numbers of people at the Lake engaged in fishing, picnicking, running and biking. (Tr. 26:18-24). On some days there may be 1,000 or more people at the Lake, and total attendance at the state park in 2005 was 358,000. (Tr. 49:20-50:5). She also explained the basis of her written comments about consumption of fish from the Lake, noting that

she sees people with fish on stringers or in coolers (Tr. 50:6-51:15) and has seen people eat fish from the Lake. (Tr. 65:21-24).

Yvonne Homeyer was President and Conservation Chair of the Webster Groves Nature Study Society (WGNSS) at the time the joint comment letter was submitted (Tr. 109:15-18; 110:12-20). She testified about her use of the Lake (Tr. 112:21-113:5), as well as its use by other WGNSS members. She testified that WGNSS members visit the Lake almost daily because it is considered "one of the most outstanding areas in the St. Louis area for birds." (Tr. 111:14-22). *See also* Tr. 115:9-16. More bird species have been seen at Horseshoe Lake than at any other place in the St. Louis region, 308 species in total. (Tr. 113:12-114:3). WGNSS members use the Lake both as individuals and as participants in WGNSS-sponsored outings. (Tr. 111:14-22). There are three weekly birdwatching group outings led by WGNSS members that collectively visit the Lake on a regular basis. (Tr. 112:6-20). Two members of WGNSS maintain an official list of "all the bird species that have been seen at the Lake". (Tr. 113:8-11). In addition to birdwatching, WGNSS members use the Lake and surrounding state park to observe butterflies. (111:23-112:5; 114:19-115:8).

Representatives of both the Sierra Club and Health & Environmental Justice-St. Louis also testified at the hearing. Christine Favilla is on staff with the Illinois Chapter of the Sierra Club. (Tr. 130:14-15). In this capacity, she has organized cleanups at Horseshoe Lake to remove debris that washes in from surrounding areas. The cleanups are held on an annual or semi-annual basis and attract approximately thirty participants. (Tr. 125:16-126:23). Kathleen Logan Smith also offered brief testimony about Health & Environmental Justice's comment on the Permit. (Tr. 144:5-24).

In addition to these formal witnesses, three members of the public provided oral comments at the hearing. Robert Johnson is an environmental consultant from Collinsville who has worked for a duck club that owns Canteen Lake, which adjoins Horseshoe Lake. He indicated that members of the duck club would be interested in participating in a public hearing on the U.S. Steel permit. Mr. Johnson also testified that he regularly uses Horseshoe Lake and would be interested in such a public hearing himself. (Tr. 101:17-107:9). Cathy Copley is a resident of Madison County who uses Horseshoe Lake. She testified that she supports holding a public hearing now that she knows the Lake is used as a discharge point for U.S. Steel's waste. (Tr. 107:17-108:12). Finally, Jason Warner, a Sierra Club volunteer and a user of the trails around Horseshoe Lake, offered comments on behalf of the Sierra Club about the importance of public participation in the permitting process. (Tr. 140:21-143:12).

2. The Organizations that Submitted Written Comment Letters Have a Sincere Interest in the Health of Horseshoe Lake and Collectively Represent Thousands of Members.

The organizations that submitted comment letters requesting a public hearing have a concrete interest in the health of Horseshoe Lake and collectively represent thousands of members. (AR 537-39). The organizations signing on to the joint letter included the American Bottom Conservancy, Sierra Club, Webster Groves Nature Study Society, Health & Environmental Justice-St. Louis, and the Neighborhood Law Office. Health & Environmental Justice-St. Louis also submitted a comment letter of its own. (AR 532).

ABC is an organization that works to protect the natural and cultural resources of the American Bottom, which is that part of the Mississippi River floodplain that extends

from just below Alton, Illinois, south to the Kaskaskia River. (Tr. 23:17-24:1; 24:13-18). ABC monitors and participates in government decisions that might affect the American Bottom, including decisions of IEPA, IDNR, and local entities. (Tr. 24:2-12). It also works with neighborhood organizations to address local issues. (Tr. 24:8-9). ABC has approximately 100 members. (Tr. 24:22-24).

WGNSS has over 400 members and has been in existence since 1920. (Tr. 110:3-11). It is primarily an organization dedicated to nature study, but it gets involved in permitting actions that impact wildlife habitat. (Tr. 110:24-111:4). Its members regularly use the Lake and surrounding state park as described above. Its Conservation Chair, Yvonne Homeyer, testified that the organization has an interest in U.S. Steel's permit because any discharge that affects wildlife would affect the activities of WGNSS's members. (Tr. 116:2-17). Based on these interests, Ms. Homeyer testified that WGNSS members would have attended a public hearing on the U.S. Steel permit had there been one. (Tr. 116:18-21).

The Sierra Club, which has 26,000 members in Illinois and 650 members in the area around Horseshoe Lake, was also a signatory to the joint comment letter. (AR 539; Tr. 126:24-127:3). The Sierra Club engages in cleanups at Horseshoe Lake and has an interest in its overall health. Health & Environmental Justice, an organization that has approximately 500 members and works on environmental justice issues in the St. Louis metropolitan region, also signed on to the joint comment letter and submitted a comment letter of its own. (AR 532; Tr. 144:9-24).

Collectively, these organizations represent thousands of members. The organizations chose to express their interest in the U.S. Steel permit by submitting group

comment letters rather than asking their members to send in numerous individual comments. A public hearing would have allowed the organizations' members to provide IEPA information about Horseshoe Lake and to ask questions about the terms of the permit.

3. The Comment Letters Raised Significant Concerns About the Draft Permit, Which IEPA Made Little Effort to Address.

The need for a public hearing is demonstrated further by the significant issues raised in the public comment letters, which IEPA almost completely failed to investigate before issuing the permit. The joint comment letter raised at least two issues that could have – one of which definitely should have – affected the terms of the Permit. First, the letter pointed out that a Southern Illinois University at Edwardsville (SIUE) professor had conducted studies of the bottom sediment in Horseshoe Lake and had found high levels of heavy metals, including zinc and lead. IEPA's permit writer noted in her records that obtaining a copy of these studies would be "beneficial," yet the Agency never even took that meager step. Second, the letter brought to IEPA's attention reports of fish being caught from Horseshoe Lake with melanoma. Again, the Agency noted that "[m]ore information is needed," but it never took any action to determine whether pollution might be causing diseased fish in the Lake.

The January 18, 2005 joint comment letter pointed out to IEPA that Professor Richard Brugam at SIUE had studied the bottom sediments at Horseshoe Lake. (AR 537). The letter indicated that the studies had been obtained only recently and had not been reviewed thoroughly by the commentors. (AR 539). Copies of the studies were not submitted, but the letter suggested that IEPA hold a public hearing to address this issue. *Id.* The comment letters also raised a concern about heavy metals in the U.S. Steel

discharge (AR 532, 537) and mentioned that Horseshoe Lake was already impaired for a number of pollutants.[7] (AR 537).

Despite the fact that the joint comment letter raised this concern, IEPA took virtually no action to investigate whether U.S. Steel's discharge was contributing to the contamination of bottom sediments. The IEPA permit writer's notes state: "A copy of the SIU-E study would be beneficial to determine its relevance in this matter." (AR 603). Further, the notes state: "The commentors did not provide a copy of the study, and thus it is not possible to know the nature of the study." (AR 604).

Although IEPA did not visit a library to obtain the study, nor apparently pick up a phone and talk with Professor Brugam, it did download an abstract of the study from the Internet. (AR 604). That abstract only served to highlight the relevance of the issue and should have spurred further inquiry by IEPA. The abstract, which is in the record, states: "A record of metal contamination exists in the sediment of Horseshoe Lake . . . . Lead, cadmium and zinc concentrations increased in the sediment after the 1940's. This increase in heavy metals is probably related either to increased input to the lake from local industrial activities or the use of lead shot by local waterfowl hunters." (AR 604-05).

IEPA's failure to investigate the contamination of Horseshoe Lake sediments is troubling because U.S. Steel discharges significant quantities of two of the pollutants – zinc and lead – identified in the abstract of the SIUE study. The load limits in the permit

[7] The IEPA public notice erroneously omitted zinc from the list of pollutants causing impairment. (AR 519). Zinc was identified on both the 2004 and 2006 303(d) lists as a potential cause of impairment.

allow U.S. Steel to discharge up to 4,380 pounds of zinc and 2,044 pounds of lead into the Lake each year.[8] (AR 652).

The unanswered questions relating to contaminated sediments show that substantial issues were raised in the joint comment letter that should have been investigated by IEPA through a public hearing. IEPA has a legal duty to ensure that NPDES permits comply with both numeric and narrative water quality standards. 35 Ill. Admin. Code § 309.143(a) (2005). Although Illinois has no numeric criteria for heavy metals in sediment, the narrative criteria prohibit "bottom deposits" that are of "other than natural origin." 35 Ill. Admin. Code § 302.203 (2005). IEPA did nothing to ensure that U.S. Steel's discharge is not causing or contributing to high levels of heavy metals in the bottom of Horseshoe Lake, despite substantial indications that a problem exists. IEPA could have gathered information on the subject if it had held a public hearing.

The joint comment letter also raised a concern about fish with melanoma being caught in Horseshoe Lake. (AR 537). Again, the IEPA permit writer suggests that the Agency should investigate this issue, stating:

> More information is needed on the fish with melanoma issue-was this reported as part of an IDNR study, or did one fish appear with melanoma, and was confirmed by an IDNR fish biologist?

(AR 603). IEPA did not follow up on this question.

The health of resident fish populations is of heightened importance due to the fact that many people consume fish from Horseshoe Lake, some for subsistence purposes, and that the Lake is already impaired by numerous pollutants. (AR 532, 537; Tr. 50:8-51:20).

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[8] These figures are calculated using the permit's 30-day average for the daily load limit. (AR 652). For zinc, 12 pounds per day X 365 days = 4,380 pounds per year. For lead, 5.6 pounds per day X 365 days = 2,044 pounds per year.

IEPA, however, may have doubted whether people eat fish from Horseshoe Lake (AR 561), despite the fact that its sister agency IDNR publicizes fishing opportunities on its website. (AR 532). IEPA could have found out more about public uses of the Lake like fishing if it had held a public hearing on the permit.

IEPA never followed up with ABC or anyone else to investigate the seriousness of fish diseases at Horseshoe Lake nor to determine the extent to which people eat the fish from the Lake and how much fish is consumed by those fishing for subsistence purposes. (Tr. 39:19-21). These are exactly the types of issues that could have generated important information through a public hearing.[9]

IV. Conclusion

The Board was correct to invalidate the permit as a remedy for IEPA's unlawful failure to hold a public hearing. In order to prevail on its Amended Motion to Reconsider, U.S. Steel has to identify newly discovered evidence or changes in the law, or show that the Board misapplied the law. U.S. Steel has come forward with no new evidence or changes in the law, and has not met its burden of proving that the Board misapplied the law.

For the foregoing reasons, ABC requests that the Board deny U.S. Steel's Motion to Reconsider.

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[9] There were numerous other concerns with the proposed permit raised in ABC's subsequent comment letters and the Petition for Review that could have been addressed at a public hearing. For example, IEPA staff recommended a monthly average effluent limit for WAD cyanide of 0.0052 mg/L (AR 475-76), whereas the limit in the final permit is 0.01 mg/L, nearly double the recommended value. (AR 652). Curiously, the permit writer's notes acknowledge that the actual amount of cyanide in U.S. Steel's discharge in recent years is higher than the recommended limit of 0.0052 mg/L. (AR 475). In addition, U.S. Steel was granted a higher ammonia limit for the month of March. Similar to the situation with cyanide, the ammonia limit for March was weakened only after U.S. Steel indicated that its discharge would violate the limit in an early draft of the permit that was shared with the company. (AR 507).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 23rd day of March 2007, one copy of the foregoing **American Bottom Conservancy's Response to U.S. Steel's Amended Motion to Reconsider** was sent via electronic communication to the following:

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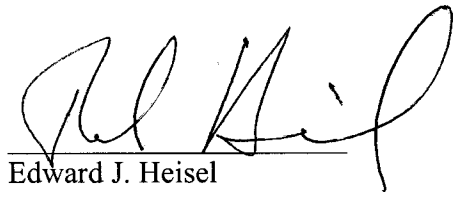

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